

In this connection I would quote the observation of Windham J.A. in the *East African Court of Appeal* ⁽³⁾ which the Privy Council was able to "adopt without qualification" in the case of *Popatlal v. Visandji*, *supra*, at p. 725:—

"Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, ... upon the Torrens system of registration."

Considerations of the same nature apply to the appellant's complaint that his allegations as to how he came to execute the instrument of charge were not given effect to. Once an instrument of charge is registered then by reason of section 96 the charge becomes effective for all purposes and then by reason of section 42 the title of the chargee is indefeasible unless it has been obtained by fraud or misrepresentation to which the chargee is proved to be a party or the registration has been obtained by forgery or by means of an insufficient or void instrument.

In the present proceedings, the Collector was bound to accept the register and once he was satisfied that the charge with which he was concerned was on the register then the only question for him to decide was whether or not there had been default in the payments provided for. If he was not so satisfied he could make no order. If he was so satisfied he was obliged to make an order under the provisions of sections 141 and 142. It may be, as suggested by Watson J.C. in the case of *Nagappa Chetty v. Lam Sing*, ⁽⁴⁾ that he had some sort of inherent power to postpone a sale if fraud or mistake was alleged. I can, however, find no power which would have enabled him to investigate any allegation of fraud or misrepresentation, and he could not have gone beyond granting a period of delay to enable the party making the allegation to take proceedings for rectification of the register under section 240.

The appellant had had ample time to take proceedings for rectification of the register, for some time prior to the proceedings before the Collector he had had legal advice and before the Collector he was legally represented. No mention of any such proceedings having been commenced or even being in contemplation was made to the Collector nor was any application for time addressed to him.

In the circumstances I would dismiss the present appeal with costs.

Hill and Barakbah J.J.A. concurred.

Appeal dismissed.

Solicitors: Cheang Lee & Ong; N. Sharma.

A WONG ENG v. CHOCK MUN CHONG & ORS.

[O.C.J. (Gill J.) April 15, 1963]

[K.L. — Civil Suit No. 66 of 1962]

Tort — Motor accident — Negligence — Plea of res ipsa loquitur by plaintiff — Defendants producing evidence to show latent defect — Inevitable accident.

Practice and Procedure — Pleadings — Function of.

The first defendant, the servant of the second defendant, was driving a bus which when negotiating a left hand bend went to the right side of the road and collided with a lorry coming from the opposite direction. As a result the plaintiff, a conductor in the bus, sustained injuries and brought the present action. The defendants in reply to the plaintiff's plea of *res ipsa loquitur* produced evidence to show that while the bus was being driven round the bend the offside first wheel stub axle broke by reason of a latent defect of which neither defendants were aware and which could not be discovered by reasonable examination and that as a result the first defendant was unable to control the bus. The bus was regularly serviced and repaired but on the day before the accident the first defendant had discovered that the bus moved to the right when the brakes were applied and that just before the accident there were some slips at the steering which were not serious.

In the particulars of negligence the plaintiff alleged that the first defendant (a) drove the bus to the wrong side of the road; (b) failed to apply his brakes effectively, (c) failed to exercise due care and skill in the management of the bus and (d) failed to take any or adequate precaution in driving the bus. The plaintiff did not allege that the bus was unroadworthy at the time of the accident.

Held: (1) the collision was caused by an inevitable accident;

(2) on the pleadings and in the light of the evidence the defendants cannot be held responsible merely because they did not negative some possible case which had never been alleged against them in the pleadings or made against them in the course of the trial.

F Cases referred to:—

- (1) *Scott v. London Dock Co.* (1865) 3 H. & C. 596.
- (2) *Russell v. London & South-Western Railway Co.* (1908) 24 T.L.R. 548.
- (3) *Tan Giok Hue v. Lim Swee Peng* [1960] M.L.J. 190.
- (4) *The Marpesia* (1872) L.R. 4 P.C. 212.
- (5) *The Merchant Prince* [1892] P. 179, 190.
- (6) *The Schwan* [1892] P. 419, 434.
- (7) *Esso Petroleum Co. Ltd. v. Southport Corporation* [1955] 3 All E.R. 864.
- (8) *Winnipeg Electric Co. v. Jacob Geel* [1932] A.C. 690.
- (9) *Phillips v. Britannia Hydraulic Laundry Co. Ltd.* [1923] 2 K.B. 832.

H ACTION.

Kam Koon Wah for the plaintiff.

N. A. Marjoribanks for the defendants.

Cur. Adv. Vult.

Gill J.: This is an action for damages for personal injuries sustained by the plaintiff as a result of a collision between motor bus BC 6887 and a motor lorry. The plaintiff was the conductor and the first and second defendants were the driver and owners respectively of the motor bus at the time of the accident.

There is no dispute about any of the material facts relating to the collision and they are relatively simple. The collision took place on the 13th August, 1961 at about 8.30 a.m. at the

16½ mile, Klang Road when the first defendant was driving the bus from the direction of Klang towards Kuala Lumpur. Just before the accident the bus was on its correct side of the road and it was about to negotiate a left-hand bend. As it was about to negotiate the bend the bus went on to the right side of the road and collided with the lorry coming from the opposite direction.

On the facts stated above it is clear, and I so hold, that the plaintiff has established *prima facie* case of negligence on the part of the first defendant on the principle of *res ipsa loquitur*, which was stated by Erle C.J. in *Scott v. London Dock Co.* (1) in the following words:—

"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

To elaborate on the meaning of the phrase *res ipsa loquitur*, Kennedy L.J. in *Russell v. London & South-western Railway Co.* (2) stated as follows:—

"The meaning, as I understand, of that phrase (and one must be careful not to be misled by phrases) is this, that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence. The *res* speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is, some want of reasonable care under the circumstances. *Res ipsa loquitur* does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of."

In the case of *Tan Giok Hue v. Lim Swee Peng* (3) Ong J. said:—

"If a motor-car is driven with reasonable care and skill in executing a simple manoeuvre of going round a bend it is ordinarily not found on the wrong side of the road where it ought not to be and in the path of an oncoming vehicle. The onus, therefore, rests upon the defendant to show that his motor-car found itself where it did without any negligence on his own part."

With that statement of the law by his Lordship I respectfully agree.

Once the burden of proof is thrown upon the defendant to establish facts negating his liability, one way in which he can do this is by proving inevitable accident. This, indeed, is the defence set up in this case. The defendants allege in their pleadings that the damage to the plaintiff, if any, arose from inevitable accident. In proceeding to give particulars of the inevitable accident the defendants state that while the motor bus was being driven round the bend in the road by the first defendant the offside front wheel stub axle broke by reason of a latent defect

A of which neither the first defendant nor the second defendants were aware and which could not be discovered by reasonable examination, and that as a result the first defendant was not able to control the steering of the motor bus. It is further stated that at about the same time the first defendant applied the footbrake which did not act because of the damage to the offside front wheel hydraulic brake hose which followed the braking of the axle.

B Inevitable accident, to paraphrase the definition given in *The Marpesia* (4) and repeated in *The Merchant Prince* (5) and bearing in mind the observation of Lopes L.J. in *The Schwan* (6) that he knew no distinction as regards inevitable accident between cases which occur on land and those which occur at sea, is something which the party charged could not possibly prevent by the exercise of ordinary care, caution and skill.

In *The Merchant Prince* Lord Justice Fry said:—

D "The burden rests on the defendants to show inevitable accident. To sustain that, the defendants must do one of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to everyone of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

E The evidence of the first defendant is that on August 13, 1961 he was employed as a bus driver by the second defendants and that on that day at about 8.30 a.m. he was driving bus BC 6887 from Klang to Kuala Lumpur. As he got to the 16½ milestone there was a slight bend on the road going to the left. He turned the steering wheel to negotiate the bend but the bus did not respond to his turning. He applied the brakes but they did not work and he eventually crashed into a lorry coming from the opposite direction. He said that there was nothing he could do to avoid colliding with the lorry. He further said that he had been driving the bus for a few months and that he had not noticed anything wrong with the steering or the braking system of the bus that morning. The bus was regularly serviced and repaired and had in fact gone in for repairs about three or four days before the accident. However, under cross-examination he admitted that on the day before the accident at the 18th mile, Klang Road the bus moved to the right when the brakes were applied and that just before the accident there were some slips at the steering although they were not serious. A relief driver, Lim Seng Yin (P.W.3), told him three or four days before the accident that the bus was not in good order but he did not send the bus to the workshop because it had been there on the previous day for repairs.

I Karthigesu Subramaniam (D.W. 2), a vehicle examiner attached to the Office of the Senior Registrar and Inspector of Motor Vehicles, Kuala Lumpur, gave evidence to say that he examined motor bus BC 6887 at about 3.30 p.m.

on 14th August, 1961 and found that the offside front wheel stub axle of the bus was broken. He also said that the steering and the braking system are connected to the stub axle so that if the stub axle breaks, the steering and the braking system would be affected. He further said that the steering was all right before the damage but that he could not say whether the damage to the steering was caused before, at the time of or after the accident.

The defendants also produced evidence to show that they paid a fixed rate of \$4,200 a month on a contract with a motor repairer to keep all their buses under proper repair. Bus BC 6887 was sent to the workshop on 4th May, 1961 for servicing and for the change of a kingpin. The changing of the kingpin involved the taking out of the two front wheels, the hubs, the brakes and also the stub axle (which was described by the repairer and his mechanics as a shaft). None of the parts dismantled for the changing of the kingpin were found faulty. Again the bus was sent for the changing of the front, rear and right brake lining on 9th August, 1961.

In order to decide whether the defendants have discharged the onus which is cast upon them, I must state that the driver of a vehicle is bound to use reasonable care to keep it under proper control. This involves a duty to use reasonable care to keep it in proper condition so that proper control can be exercised. The owner of a vehicle must take such steps as a prudent owner would take to keep his vehicle in proper repair. If he fails to take such care so that the vehicle is defective, it is evidence of negligence on his part. It would also be negligence on the part of the driver if he was aware of any defect in the vehicle and he failed to bring it to the notice of the owner.

It is to be observed that the particulars of negligence alleged against the first defendant in the plaintiff's statement of claim are:—

- (a) that he drove the said bus to the wrong side of the road;
- (b) that he failed to apply his brakes effectively;
- (c) that he failed to exercise due care and skill in the management of the said bus;
- (d) that he failed to take any or adequate precaution in driving the said bus.

It is clear that it is on those particulars of negligence that the claim against the second defendants is based on their vicarious responsibility. There being no allegations of the bus being unroadworthy so as to make them liable independently of the negligence alleged against the first defendant. The only evidence in Court which may be said to be remotely connected with the question of the bus being unroadworthy was the evidence of Lim Seng Yin (P.W.3) who acted as relief driver of the bus three or four days before the accident. He said that when he drove the bus on that one occasion he found the steering heavy and that when he used the brakes the bus moved to its right side. Against this there is the evidence that the bus was sent for repairs four days before the accident and that its brake linings were

changed. There is also the evidence, as I have stated above, that the first defendant noticed nothing wrong with the steering or the braking system on the morning of the accident. In the circumstances I do not think that the defendants can be held responsible merely because they did not negative some possible case which has never been alleged against them in the pleadings or made against them in the course of the trial. As Lord Normand stated in the House of Lords in the case of *Esso Petroleum Co. Ltd. v. Southport Corporation*:⁽⁷⁾

"The function of pleadings is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them."

To condemn a party on a ground of which no notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

From the evidence produced by the defendants it would seem clear that the explanation advanced by them for the accident is that there was a latent defect in the stub axle of the bus as a result of which it broke and brought about the accident. A latent defect is a defect which is hidden, concealed or dormant. It is something which exists but is not sufficiently developed or manifest so as to be visible to the naked eye. Thus a latent defect is a defect which cannot be detected by reasonable skill, care and examination. The case of *Winnipeg Electric Co. v. Jacob Geel*⁽⁸⁾ is an authority for the proposition that it is inevitable accident to prove that a highway collision has been caused by a latent defect in one of the colliding vehicles. I think it is well settled law that there is no absolute duty to keep the vehicle in proper condition. Accordingly, in *Phillips v. Britannia Hydraulic Laundry Co. Ltd.*⁽⁹⁾, where, owing to a defect in the axle of a motor lorry, a wheel came off while the lorry was being driven in the highway and damaged a van, and it was proved that the lorry had, two days before, been returned from the makers where it had been overhauled and repaired, the owners of the lorry were held not liable.

I am satisfied on the evidence that the first defendant was unable to steer the bus or to stop it because of the sudden breakage of the stub axle when he started to negotiate the bend. I therefore find as a fact that the latent defect was the cause and not the result of the collision. That to my mind answers every allegation of negligence made against the first defendant. The action against him on the basis of the alleged negligence and against the second defendants on their vicarious liability must therefore fail.

I sympathize with the plaintiff and express the hope that the second defendants as the employers of the plaintiff at the time of the accident will see fit to make him an ex-gratia payment of some sort, but in the circumstances I have no option but to dismiss his claim against the defendants with costs.

Claim dismissed.

Solicitors: Kam Woon Wah & Co.; Lovelace & Hastings.